



# Challenging Workplace Disability Scenarios

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# Presented By



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# “Invisible” Disabilities Defined

- Medical impairments whose effects on the individual may not be readily apparent to an observer, with symptoms such as debilitating pain, fatigue, dizziness, cognitive dysfunction, learning differences and mental health issues.
- Despite not always being obvious to others, invisible impairments can sometimes or always limit daily activities, ranging from mild challenges to severe limitations that can vary from person to person.

# “Invisible” Disabilities – Accommodation Challenges for Employers

- Knowing when interactive process is triggered – on notice of:
  - impact on essential functions?
  - impact on ability to follow conduct standards?
  - possible direct threat?
- Determining work-related impact of impairment on this employee
- Getting clear/sufficient information from medical providers
- Wide range of potential accommodations
- Asking the right questions about possible accommodations and adapting as facts change after implementation
- Deciding when to require an independent medical examination (IME)

# Case Study: John the Janitor

## The Players:



**John** (Janitor)

**Sue** (Representative  
(Government) or Union Steward  
(Private Employer))

# Case Study: John the Janitor

## The Players:



**Jill** (HR Director)



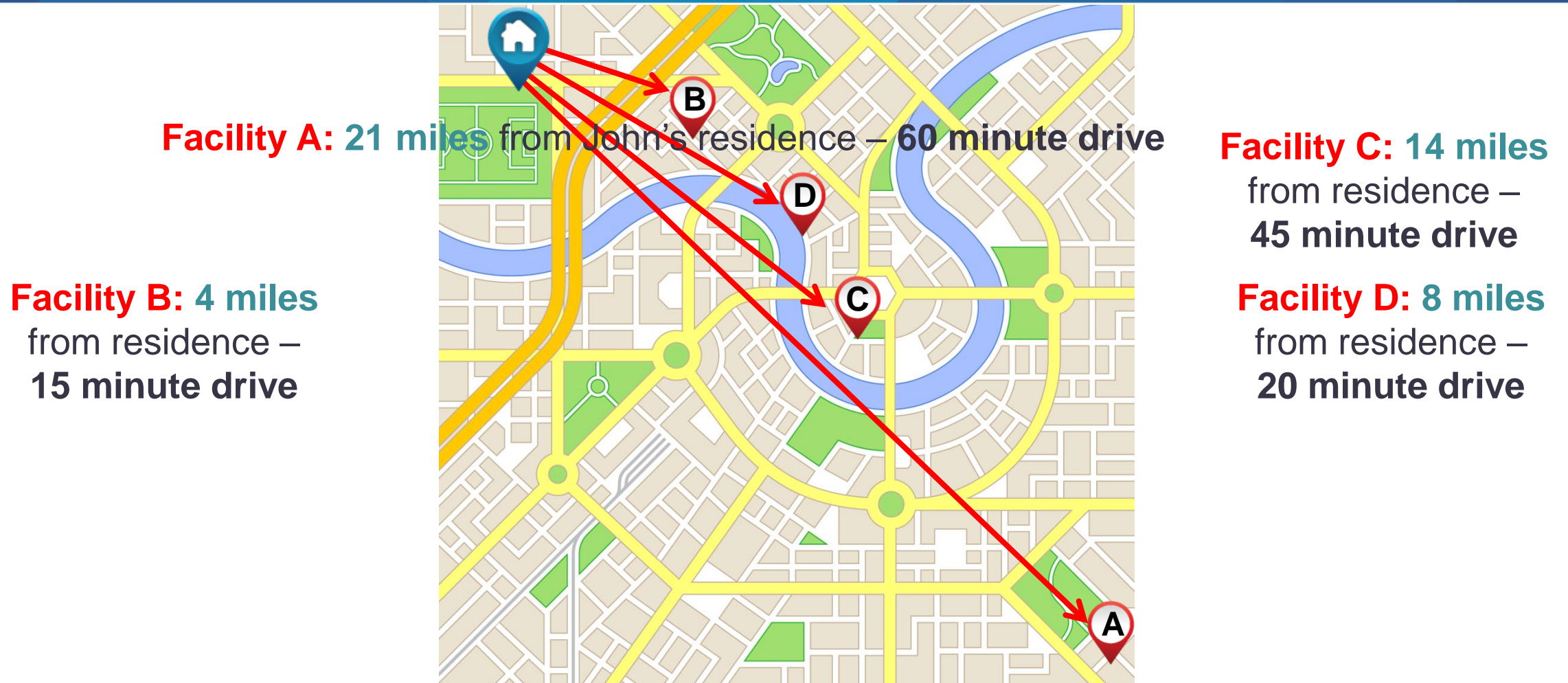
**Frank** (John's Supervisor)

# John the Janitor – Back Story

- John was hired by the Company as a Janitor in 2006
- Position is classified (government) or union (private employer)
- Assigned to **Facility A**
- 101 KAR 1:335 (government) or CBA (private employer) governs transfers



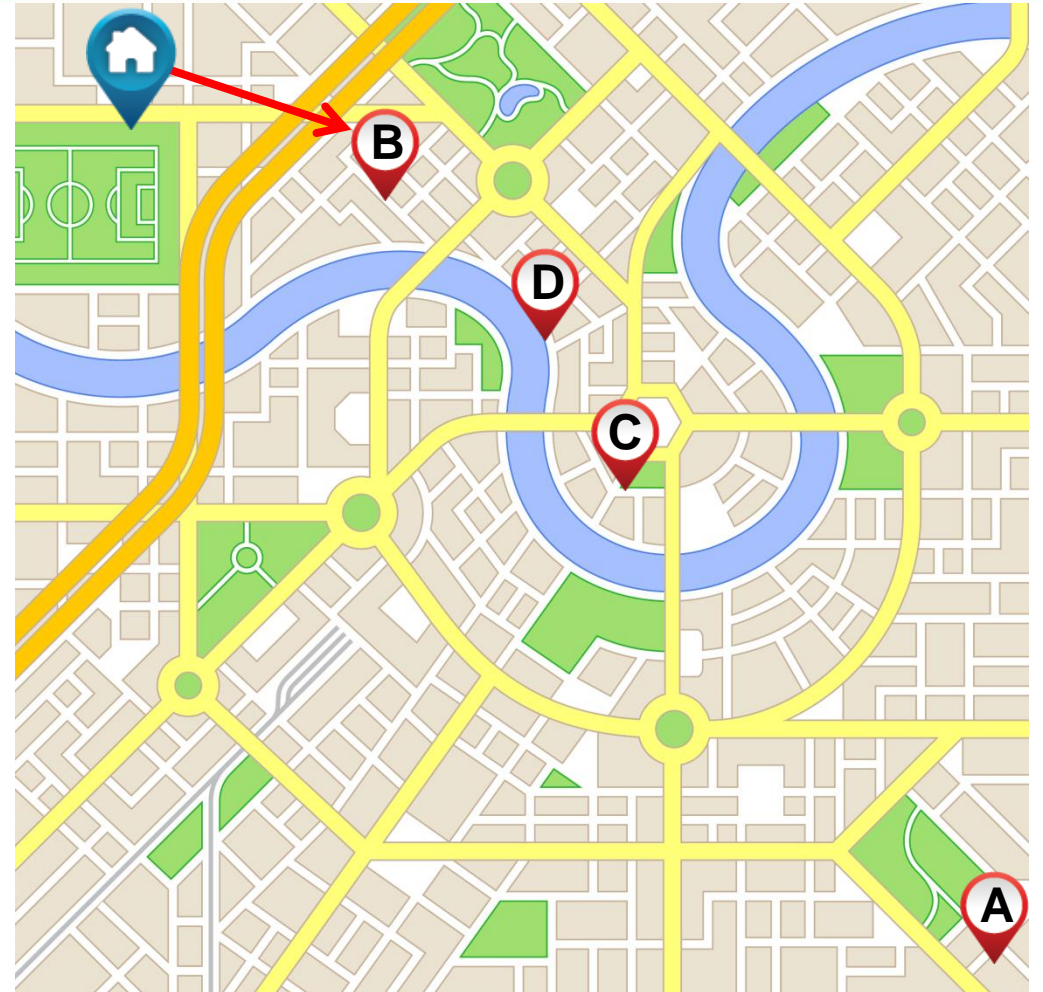
# John the Janitor – Back Story





# John the Janitor – Events in 2015

- John has arguments over assignments with supervisors
- Co-workers complain he's shirking his job duties
- Shoving match with one co-worker
- Transferred to **Facility B** (4 miles from residence – 15 minute drive) on August 3, 2015 because of “friction with supervisors and co-workers”



# John the Janitor – 2016

## June 11, 2016

John receives Final Warning (written reprimand)

- Insubordinate behavior for repeatedly swearing at his supervisor, Frank, who was giving him an assignment
- No grievance filed

# John the Janitor - 2017

## December 18, 2017

- Three co-workers complain to HR about ongoing problems with John
- Allegations:
  - Shirking his job duties
  - Abusive when confronted
  - Near fistfight with one co-worker



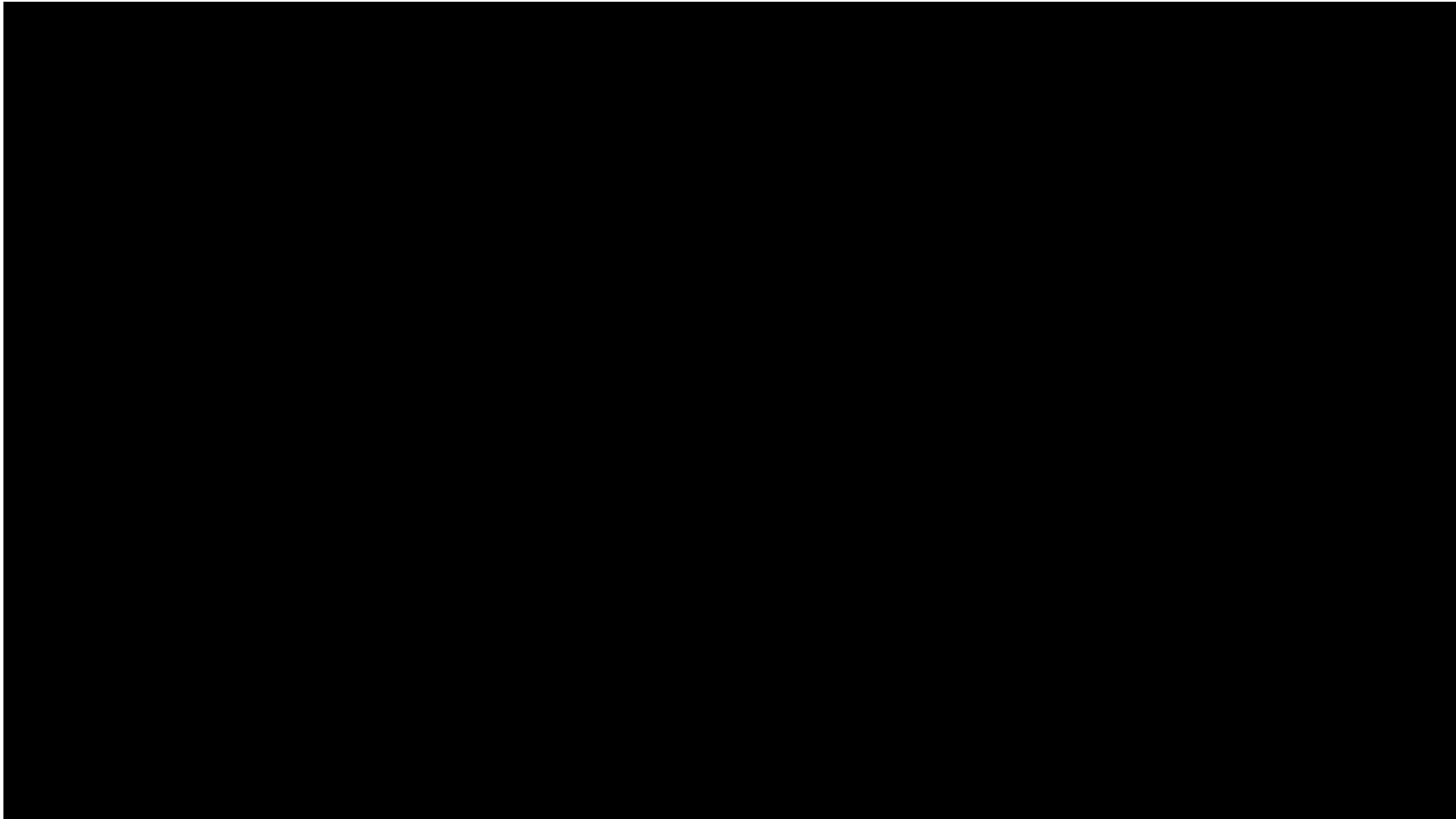
# John the Janitor - 2017

## December 21, 2017

- HR interviews John, who denies most of co-workers' claims
- HR (Jill) meets with John's supervisor (Frank)



# Jill (HR) Meets with Frank (John's Supervisor)



# Issue Spotting and Discussion

## ISSUES:

1. Justified to start ADA process?
2. *Smart* to start ADA process?
3. Issue with the transfer?





# John the Janitor – December 2017 (Continued)

## December 22, 2017

- Jill's boss, the VP of HR, tells her to hold off on the contemplated transfer to another facility until the ADA process plays out.
- Jill sends John a questionnaire for his doctor to fill out, and tells him he has to have it returned within a week.



# ADA Questionnaire

**December 27, 2017**

John submits the form, as completed by Courtney Smith, P.A., a Physician's Assistant in his primary care doctor's office.





### ACCOMMODATION QUESTIONNAIRE

<b>Employee Name:</b> John Jensen	<b>Date:</b> December 21, 2016
<b>Job Title:</b> Porter	

Dear Health Care Provider:

Please answer the following questions regarding our employee's medical status, and fax the document back to the Company at 354-555-3241. A job description for the employee's position is attached. Thank you in advance for your cooperation.

1. Does Employee have a medical impairment(s) that substantially limits a major life activity and/or major bodily function?

Yes \_\_\_\_\_ No ☒

If you answered "No," do not answer the remaining questions, but complete and sign the "Certification" at the end of this letter.

If you answered "Yes," is/are the impairment(s) temporary \_\_\_\_\_ or permanent \_\_\_\_\_?

If temporary, when will the impairment(s) end, or when do you reasonably predict they will end? \_\_\_\_\_

2. Identify the major life activities and/or major bodily functions that are limited by Employee's impairment(s), and describe how the activities/functions are limited:

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3. Describe how Employee's medical impairment(s) limits his/her ability to perform any of the essential functions/requirements of his/her job and describe the restrictions in detail, referencing the attached job description:

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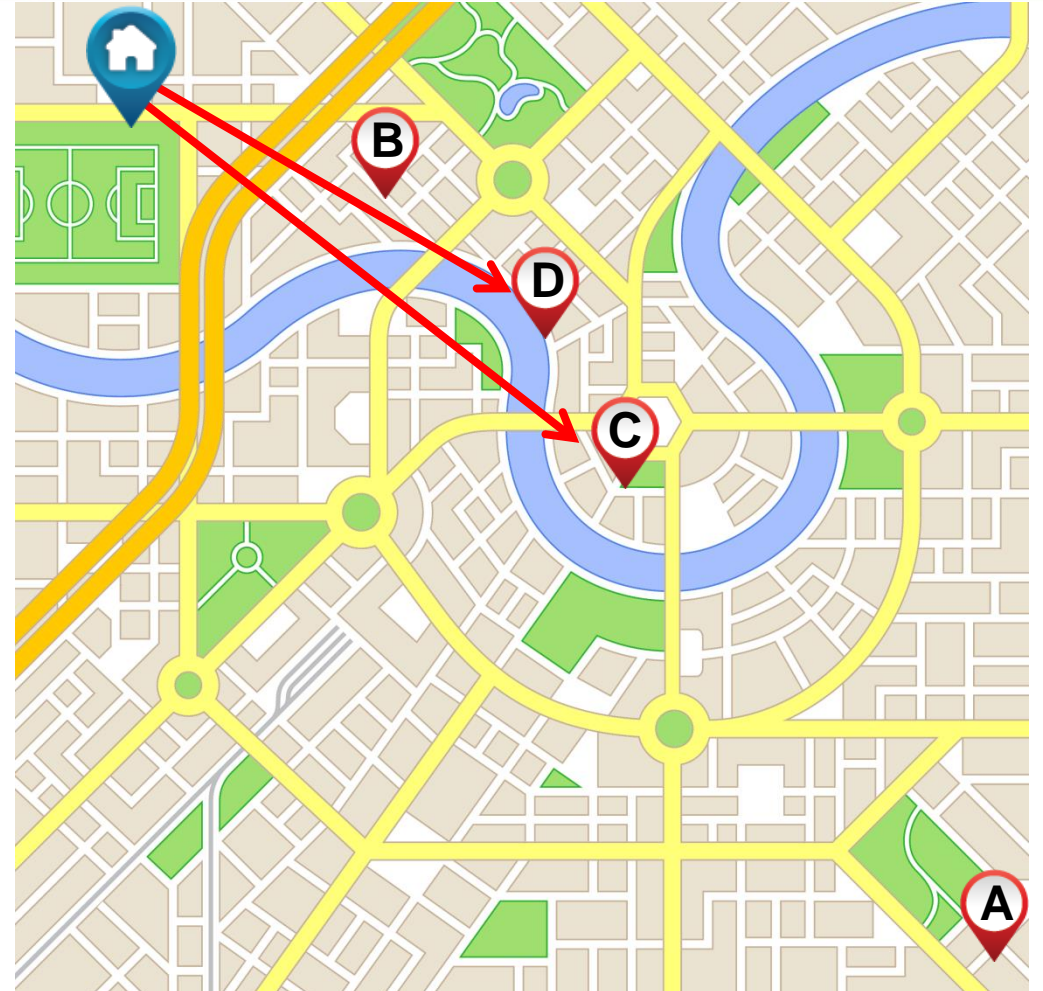
# ADA Questionnaires – Issues?

# John the Janitor – Company's Next Steps

December 29, 2017

- Jill gives John a letter stating:  
Based on input from your medical provider, the Company has concluded that you do not have any medical impairments affecting your fitness for duty. However, you are being transferred to Facility C, effective January 16, 2018 because of friction with your supervisor and co-workers.

**Facility C** is 14 miles from John's residence – 45 minute drive  
(**Facility D**, 8 miles from John's residence, has no vacancies)





# John the Janitor – FMLA Request



## January 8, 2018

- Before transfer can take effect, John requests FMLA until March 1, 2018
- Supported by doctor's note (Dr. Wong - psychiatrist)


Name John Jensen

Address 314 Meadow Dr., Centerville, NY 11232

**Rx**

Patient needs off  
from work from 1/8/17  
to 3/1/17. Suffering  
from anxiety disorder

MD Joseph P. Wong, M.D.

Signature 

FMLA Request



# John the Janitor – FMLA Request

January 13, 2018

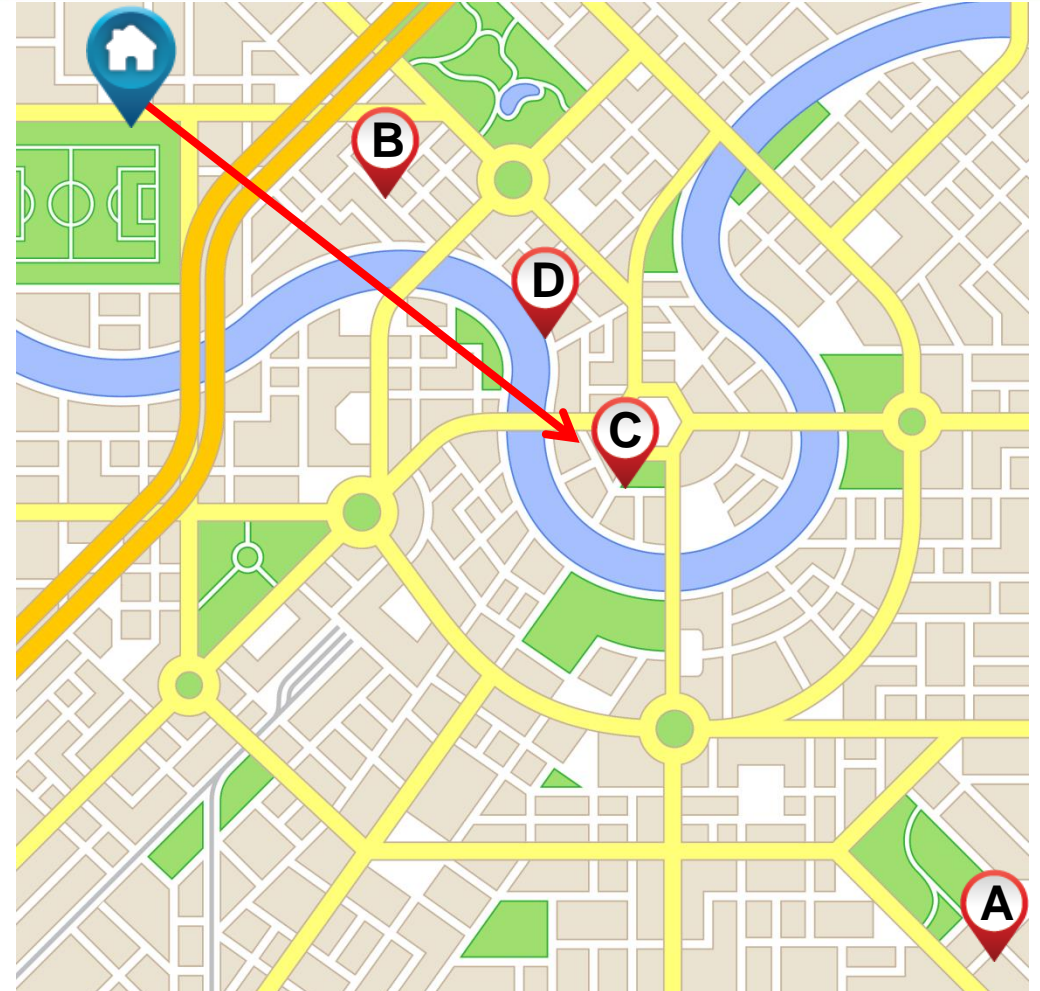
- Company grants John's FMLA request
  - Approved through February 28, 2018



# John the Janitor – Accommodation Request

February 26, 2018

- Submits second note - from Dr. Wong
  - “Cleared to return to work March 1, 2018”
  - “No commuting for more than 8 miles due to anxiety disorder.”  
(**Facility C** is 14-mile commute)
  - “Anxiety/depression impacts his interaction with coworkers and increases frustration levels.”
- Handwriting does not seem to match that of first note from Dr. Wong



# Accommodation Request – Issues?

- What to do about fact that handwriting does not seem to match prior note?
- What about fact that recent ADA response from Courtney Smith, P.A. indicated that John had “No” medical impairments?
- Does Company have to consider commuting accommodation request?
- Does indication that John’s impairments “impact his ability to interact with his co-workers” and/or “increase his frustration levels” provide basis to conclude that he is not fit for work and can’t be accommodated no matter where he is placed?



# Accommodation Request – Next Steps

## **February 28, 2018**

- Jill in HR invites John to meeting to discuss his return to work and accommodation request on March 3, 2018
- Sends form requesting additional information directly to Dr. Wong.

## **March 1, 2018**

- Jill receives email from John's lawyer, saying she plans to attend March 3 meeting
- Jill responds: "The Company will not permit you to attend my meeting with John."

# Accommodation Request – Issues?

- FMLA issue with not returning John to work on March 1?
- Direct communication with Dr. Wong okay?
- Rejection of John's attorney's request to attend meeting okay?



# Clarification of Medical Note

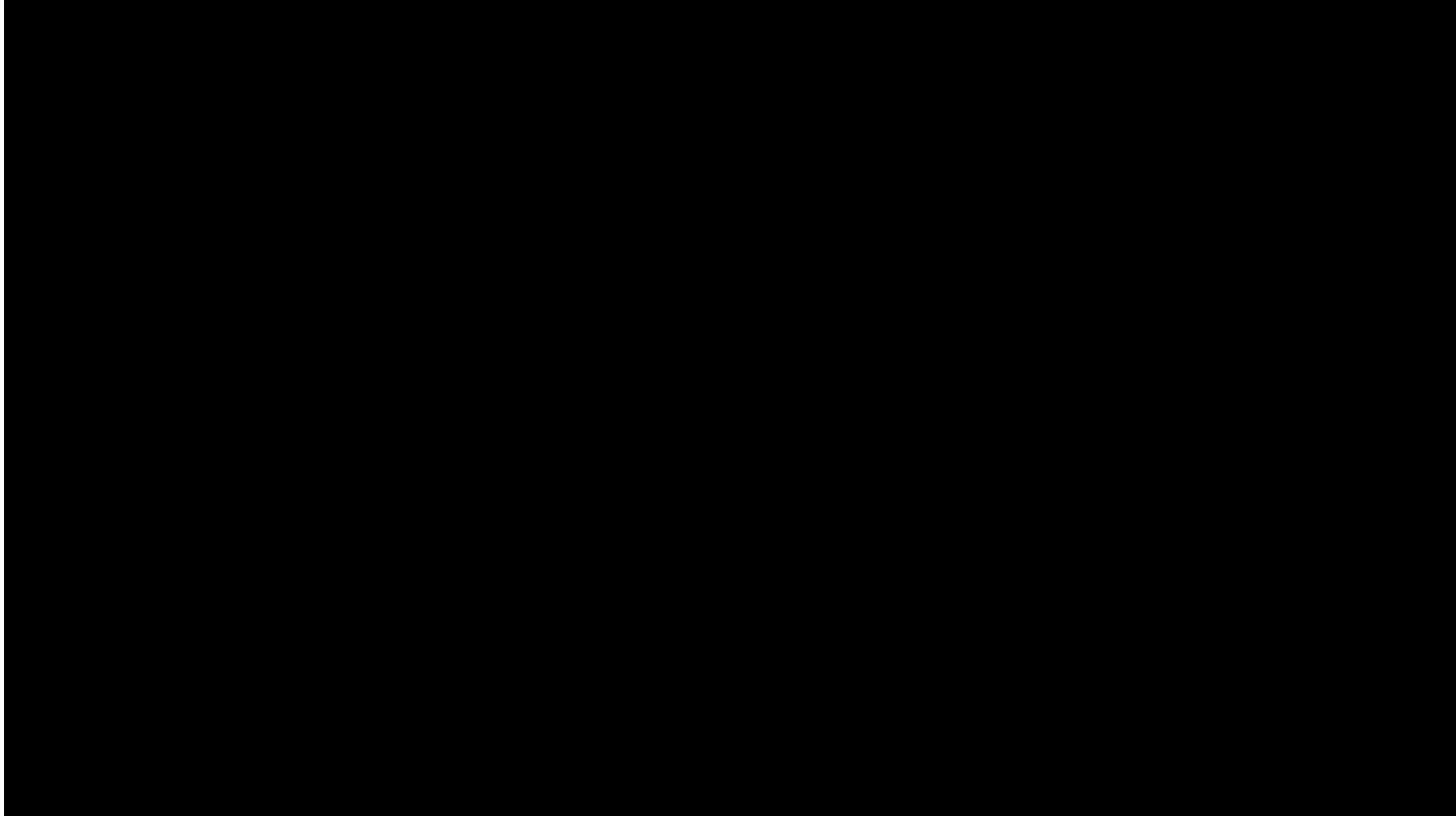
**March 2, 2018**

- Jill receives response to request for clarification of Dr. Wong's return-to-work note.
- Clarification comes from Betsy Jones, M.S.W., a social worker who practices with Dr. Wong.
  - Precise diagnosis: "Generalized anxiety disorder."
  - "John cannot drive for more than 8 miles; short commutes only at this time."
  - "Increased frustration levels may result in altercations with coworkers and others. New medication should help this."



# Jill (HR) Meets with John and Sue (Representative)

## March 3, 2018



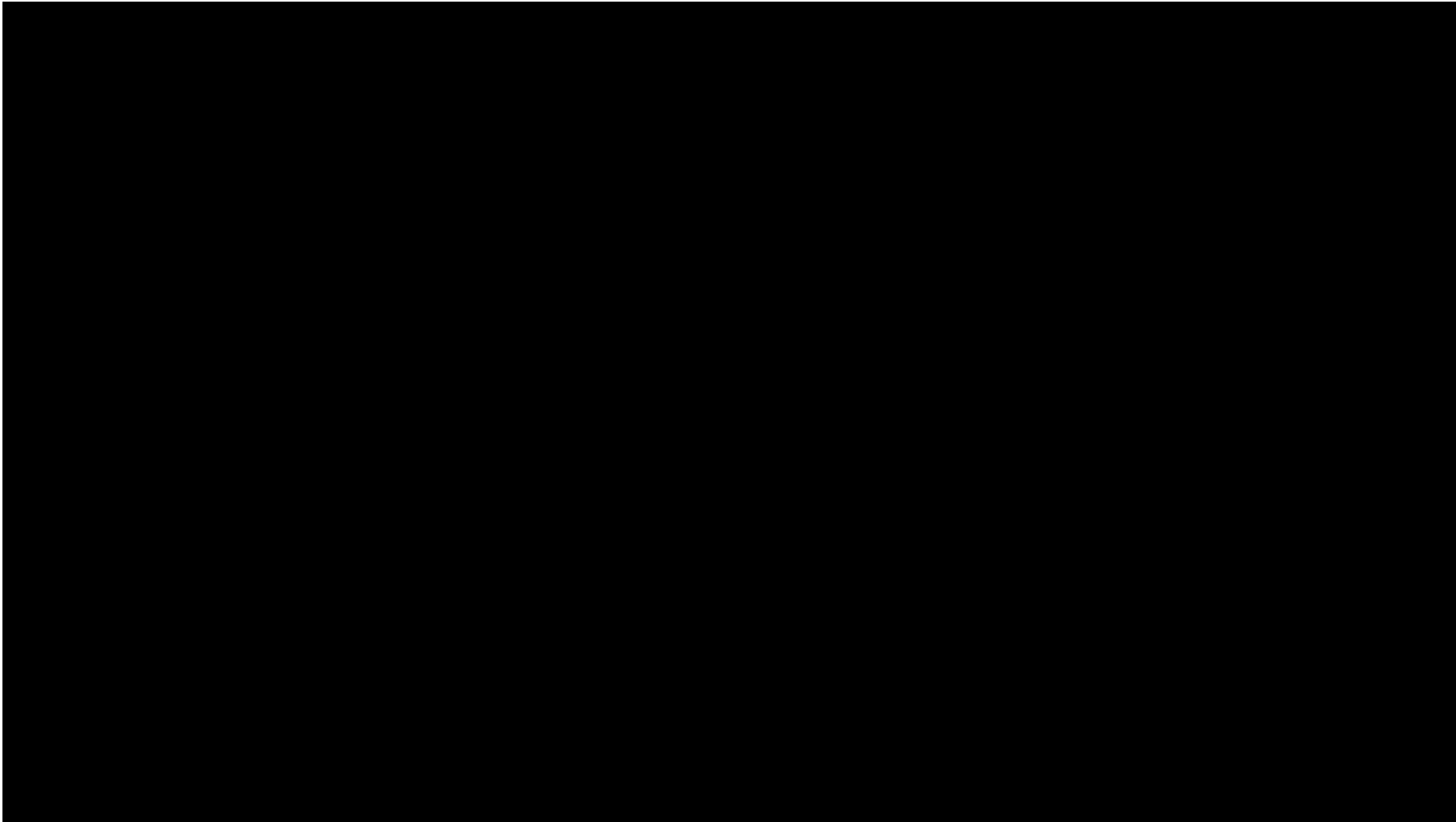
# Interactive Process Meeting – Issues?

- Does John have right to have a representative there?
- Concern about anything else that Jill said to Sue during the meeting?
- Did John say anything that should have given Jill pause?
- Any issue with fact that communication clarifying John's status came from social worker?



# Jill (HR) Meets with Frank (John's Supervisor)

## March 4, 2018

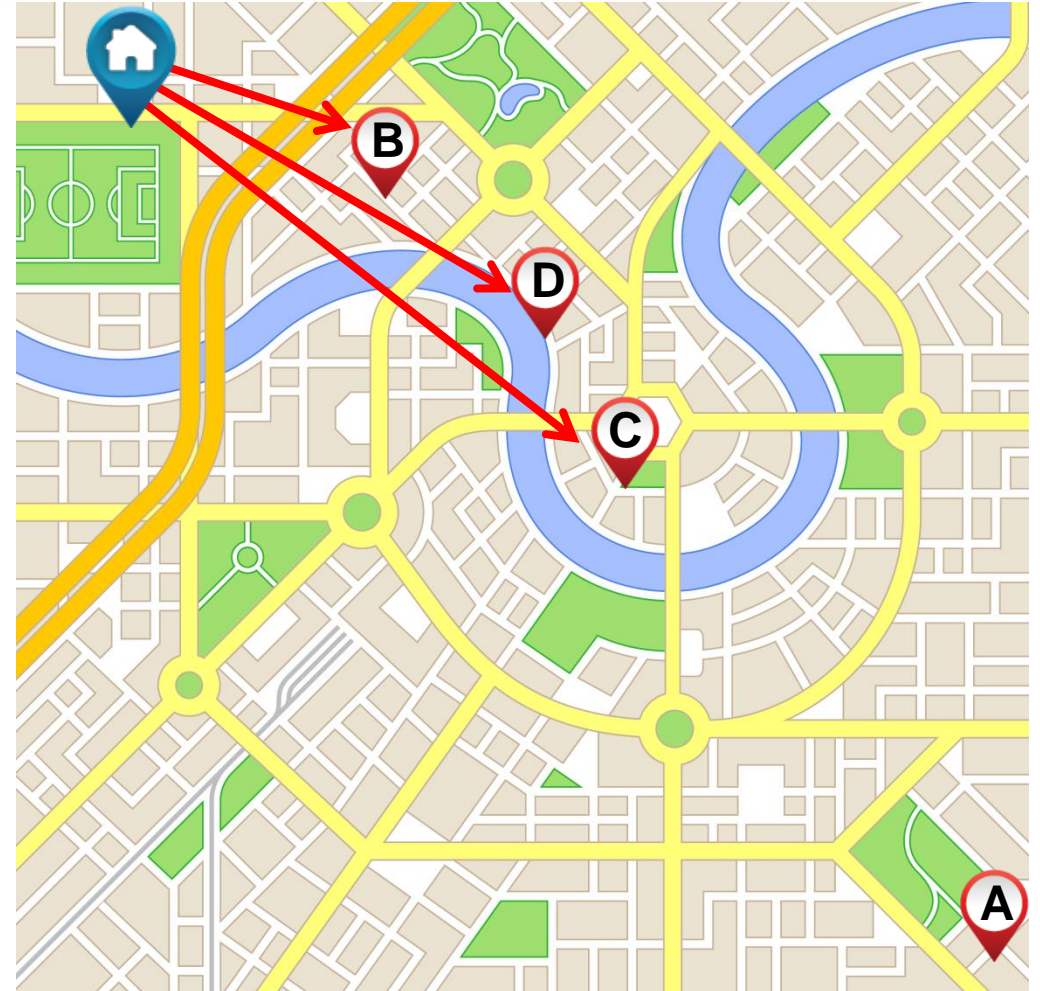


# Discussion of Interactive Process Meeting – Issues?

- Has John caused a breakdown in the interactive process as a result of his very limited elaboration on his mental health provider's note?
- Is the documentation from medical provider adequate? If not, what is missing?   
[“Generalized anxiety disorder.” “John cannot drive for more than 8 miles; short commutes only at this time.” “Increased frustration levels may result in altercations with coworkers and others. New medication should help this.”]
- Does John's “itchy trigger finger” comment convert this to a workplace violence inquiry?

# “Okay, Let’s Talk About What Our Options Are.”

- Persist with assignment to **Facility C** (14 miles/45 minute commute) while continuing with the ADA process, and terminate if John fails to show?
- Permit to return to work at **Facility B** (4 miles/15 minute commute), but conduct IME?
- Transfer to **Facility D** (8 miles/20 minute commute) as an accommodation, moving out one of the porters already there?
- Keep out on leave while continuing ADA process?



# Different Scenario to Consider

- Hired employee into key administrative role two months ago; he interviewed well, and his work performance has been excellent.
- Gradually, employee's skin has become more and more yellow, to the point where his skin color stands out to everyone who interacts with him.
- Before HR gets involved, CFO asks employee if he's feeling okay and points out the employee's skin is yellow. Employee says he feels great.
- Multiple employees complain to HR, including concerns about whether their health and safety are at any risk due to some illness of employee.
- HR initiates interactive process, and employee again says he feels great.
- Two employees who stayed at a Holiday Inn Express last night approach HR with a Google diagnosis of liver failure. They express concern about the employee's health and welfare.



# Different Scenario to Consider

- Long-time employee is one of two staff members at rural office.
- Employee misses work for several days, and then employee's elderly mother calls and advises that she has checked herself into rehab for alcohol abuse.
- Employee returns the next day and apologizes for absences, does not say anything about the reason for the absences.
- HR convenes interactive process meeting, and the employee is confused about the questions and says she feels fine and does not need any assistance.
- Employee misses the next three days of work. Elderly mother calls again, advises employee has checked back into rehab and provides address for rehab facility. Mother says employee desperately needs her job.



# Questions



# Thank You!

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